STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2005
v	No. 251877 Berrien Circuit Court
ARTHUR BURDETTE JONES, Defendant-Appellant.	LC No. 2002-412162-FC

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant Arthur Burdette Jones appeals as of right from his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC)[1] and two counts of second-degree CSC.[2] Defendant was sentenced to twenty-five to seventy-five years' imprisonment for two of the first-degree CSC convictions, fifteen to fifty years' imprisonment for the third first-degree CSC conviction, and seventy-one months to fifteen years' imprisonment for both second-degree CSC convictions. We affirm.

I. Factual Background

Defendant's convictions arose from allegations that he sexually abused his stepdaughter starting at the age of five and continuing until she was twelve. The five counts for which defendant was convicted occurred between 1998 and 2000, when the family resided in Berrien County. The complainant testified that the abuse began when her mother and defendant moved in together in 1994. The complainant's biological father had passed away and the complainant always considered defendant to be her father. In 1998, the complainant told a child protective services worker and a police officer about the abuse, but subsequently recanted her allegations.[3] The complainant testified that she recanted those allegations out of fear of being punished or being removed from her family. In 2000, the complainant's mother separated from defendant

[1] MCL 750.520(b)(1)(a) (penetration of a person under thirteen years of age).

[2] MCL 750.520(c)(1)(a) (sexual contact with a person under thirteen years of age).

[3] It appears from the record that the complainant told a family member about the abuse and that defendant's brother subsequently called the authorities.

and moved with her three children to Kentucky. The complainant and her siblings visited defendant twice. However, she called her mother to return home early from the second visit. In 2001, while living with her grandmother, the complainant told her mother of the sexual abuse during a phone conversation.

The complainant's allegations were corroborated by her testimony describing a birthmark in defendant's groin area and markings on defendant's penis. Two of defendant's female relatives also testified regarding a conversation following the complainant's 1998 accusations. The women discovered the complainant's mother crying in the garage. Defendant came outside and allegedly told the women that he knew his conduct toward the complainant was wrong and that he needed help.[4] Defendant testified on his own behalf and presented several witnesses. The defense generally denied the allegations of sexual abuse and argued that the complainant's mother had fabricated the charges to force defendant into paying child support for her two older children, who had a different father.

II. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel, as defense counsel failed to object to the admission of prior bad acts evidence under MRE 404(b) and questioned witnesses about acts that occurred before and after the charged offense dates. We disagree. Absent a *Ginther* hearing,[5] our review is limited to plain error apparent on the existing record affecting defendant's substantial rights.[6] Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[7] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[8] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[9]

As noted previously, defendant was only charged with instances of abuse occurring in a two-year period when the family resided in Berrien County. However, the prosecution elicited testimony from the complainant regarding instances that occurred prior to 1998, when the family lived in other locations. Two of defendant's relatives also testified that defendant admitted in

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[4] Suspicions of sexual abuse against the complainant had existed for several years, although it is unclear from the record who raised the earlier concerns. In 1994, the complainant was brought to Dr. James Rutherford for an examination relating to potential sexual abuse. Dr. Rutherford found no evidence of sexual abuse at that time. The complainant was again brought to Dr. Rutherford in 2001 in connection with this case. The complainant had a small tear on her rectum, near her tailbone. Dr Rutherford could not determine the source or age of the tear.

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[6] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[7] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[8] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[9] *Id.* at 600.

1998 that he had inappropriately touched the complainant in the past.[10] Defense counsel failed to object to the use of this testimony even though the prosecution failed to file the required pretrial notice of intent to introduce prior acts evidence pursuant to MRE 404(b)(2). Defendant challenges defense counsel's decision to attack the credibility of these witnesses rather than move to suppress the evidence. We first note that defendant was not prejudiced by the prosecution's failure to provide notice of his intent to introduce the prior bad acts evidence. Defense counsel had notice of the prosecutor's intent from the questions asked at defendant's preliminary examination and from the prosecution's witness list.

Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.[11] But such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. . . ."[12] We evaluate the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court.[13]

The trial court properly determined that events occurring outside the 1998-2000 period were admissible. The prosecution introduced evidence of pre-1998 assaults for the proper purpose of showing a common plan, scheme, or system. "[E]vidence of other instances of sexual misconduct that establish a scheme, plan, or system may be material in the sense that the evidence proves that the charged act was committed."[14] General similarity alone does not establish a scheme, plan, or system. The prosecution must establish "*such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*"[15] The complainant testified regarding frequent acts of sexual abuse over an extensive period of time. The frequency of the acts and prolonged course of conduct show a pattern of sexual abuse. Furthermore, throughout this period, defendant always either orally or rectally penetrated the complainant; he never vaginally penetrated her. This pattern of behavior establishes a common plan, scheme, or system. For the same reasons, we find that the "evidence of similar misconduct is logically relevant to show that the charged act[s] occurred [as] the uncharged misconduct and the charged offense[s] are

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[10] As will be discussed in further detail later, the testimony of these relatives actually involved the admission of a party-opponent under MRE 801(d). MRE 404(b) does not encompass such statements, only acts. However, defendant claimed that this testimony referred to acts that occurred outside the 1998-2000 period.

[11] MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

[12] MRE 404(b)(1).

[13] *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205; 520 NW2d 338 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

[14] *Sabin*, *supra* at 62.

[15] *Id*. at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 250-251 (emphasis in original).

sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system."[16]

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, danger of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[17] The evidence is probative to show that defendant had a scheme, plan or system in his sexual assaults on the complainant, and to rebut defendant's general denial of the allegations. However, defendant has failed to establish that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. As the evidence was properly admissible, defense counsel had no grounds to object to its admission.[18] Accordingly, defendant cannot establish that he was denied the effective assistance of counsel.

Furthermore, defendant argues that defense counsel was ineffective for eliciting testimony from the complainant's mother regarding child pornography the complainant discovered on defendant's computer.[19] However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy."[20] We will not substitute our judgment for that of defense counsel regarding matters of trial strategy or evaluate counsel's competence with the benefit of hindsight.[21]

We also reject defendant's argument that he was denied the effective assistance of counsel, as defense counsel did not object to the testimony of his relatives regarding his statements in 1998. MRE 404(b) applies to prior acts, not prior statements. Both women testified that defendant told them that he had inappropriately touched the complainant, that he knew his conduct was wrong, and that he needed help. This testimony was admissible as a non-hearsay admission of a party-opponent under MRE 801(d). Accordingly, defense counsel was also not required to object on this ground.

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[16] *Id*. at 63.

[17] MRE 403.

[18] *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

[19] Defense counsel asked the complainant's mother why the complainant called her mother and asked to return home early from her second visit with defendant. The witness testified that the complainant told her that she found child pornography on defendant's computer.

[20] *Rockey, supra* at 76.

[21] *Id.* at 76-77.

III. Sentencing

Defendant also argues that the trial court improperly imposed a minimum sentence that is 120 months above the maximum provided by the guideline range. We disagree. If a defendant's sentence is not within the appropriate range, we must determine if the trial court stated substantial and compelling reasons for the departure on the record.[22] Reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence.[23] A factor meriting departure from the sentencing guidelines must be objective and verifiable.[24] To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed.[25]

In departing upward from the sentencing guidelines range, the trial court indicated:

> The sentencing guidelines do not consider: (1) the extended period of time during which these offenses took place (from 1993-2000), (2) the numerous sexual penetrations that occurred during that time. In Court I, over 25 times, penis/mouth; in Count II, over 15 times, penis/rectum, and over 50 times overall. (3) The abuse of trust caused by the defendant. In the event a reviewing court determines that one of these reasons is not a substantial and compelling reason for departure, it is the intention of this Court that any one of these factors would justify the Court's departure.

These factors are both objective and verifiable and keenly or irresistibly grab the court's attention. The complainant testified regarding the numerous times defendant sexually abused her throughout her childhood. This testimony was corroborated, in part, by the testimony of two of defendant's relatives that defendant admitted in 1998 to inappropriately touching the complainant. The frequency of the instances of abuse over an extended period of time and the nature of the sexual abuse would certainly grab the court's attention.

Defendant asserts that the trial court erroneously considered "abuse of trust", as that factor is already taken into consideration in offense variable (OV) 10, for which he was scored ten points.[26] However, a trial court may depart from the guidelines range based upon an offense or offender characteristic that was already considered in calculating the range if the court finds that the characteristic was given inadequate or disproportionate weight.[27] As the record supports

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[22] MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

[23] *Babcock, supra* at 257.

[24] *Id*. at 257-258.

[25] *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

[26] OV 10 is scored ten points when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his authority status." MCL 777.40(1)(b).

[27] MCL 769.34(3)(b); *People v Hendrick*, 261 Mich App 673, 682; 683 NW2d 218 (2004).

the trial court's conclusion that the abuse of trust was significantly egregious and exploitative, the trial court properly relied on this factor in departing from the sentencing range. Furthermore, based on the serious nature of defendant's sexual abuse of his stepdaughter, defendant's increased sentence was proportionate to his offenses.[28]

Defendant also argues that the trial court improperly based his sentence on factors not considered by the jury in violation of *Blakely v Washington*.[29] However, the Michigan Supreme Court has already determined that *Blakely* does not apply to this state's sentencing guidelines.[30]

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper

[28] *Babcock, supra* at 264.

[29] *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[30] *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanaugh, Weaver, and Young concurred with Justices Taylor and Markman, writing for the Court, that *Blakely* is inapplicable in Michigan).